

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

MILO D. BURROUGHS,
Appellant,

DOCKET NUMBER
SF-4324-12-0160-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: August 28, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL *

Milo D. Burroughs, Yelm, Washington, pro se.

Kenneth M. Muir, Esquire, Corpus Christi, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

The appellant argues that the administrative judge incorrectly applied the burden of proof to his appeal. He argues that after he identified that his military status was a motivating factor in the agency's decision not to select him the burden of proof then shifted to the agency to prove that it would have taken the same action absent his protected status. In order to prevail on a Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) claim, however, the appellant must prove by preponderant evidence that his military service was a "substantial or motivating factor" in the actions challenged. *See Sheehan v. Department of the Navy*, [240 F.3d 1009](#), 1013 (Fed. Cir. 2001). The appellant may prove discriminatory motive or intent by either direct or circumstantial evidence. *Id.* at 1013-14. If the appellant meets this burden, then the burden shifts to the agency to rebut that claim by showing, by a preponderance of the evidence, that it would have taken the same action in the absence of the protected status. *Id.* The administrative judge articulated the correct standard and correctly found that the appellant did not provide any evidence of a discriminatory motive. Because the appellant did not meet his initial burden of proving discrimination, the burden of proof did not shift to the agency. Thus, we agree with the administrative judge's decision to deny corrective action. We also deny the agency's motion for sanctions. *See Social Security Administration v. Dantoni*, [77 M.S.P.R. 516](#), 523 (the Board will not grant an agency's motion for sanctions absent bad faith by the appellant in filing a nonmeritorious submission), *aff'd*, 173 F.3d 435 (Fed. Cir. 1998) (Table).

Further, the Veterans' Preference Act of 1944 does not provide a basis for Board jurisdiction. *See Burroughs v. Department of the Army*, [116 M.S.P.R. 292](#), ¶¶ 11-12 (2011). To the extent that the appellant is arguing that the agency's failure to award him veterans' preference points is evidence of discriminatory

animus, this argument is unavailing. Under merit promotion procedures, an agency must allow certain veterans the opportunity to compete for vacant positions for which the agency will accept applications from individuals outside its own workforce, but an agency may select a candidate without granting veterans' preference. See *Joseph v. Federal Trade Commission*, [505 F.3d 1380](#), 1383-84 (Fed. Cir. 2007). Thus, the agency was not obligated to grant him any additional preference, and any failure to do so does not suggest that the agency discriminated against him on the basis of his military experience.

Finally, the appellant's references to *Dean v. Office of Personnel Management*, [115 M.S.P.R. 157](#) (2010); *Dow v. General Services Administration*, [109 M.S.P.R. 342](#) (2008); *Massie v. Department of Transportation*, [118 M.S.P.R. 308](#) (2012); and *Whitmore v. Department of Labor*, [680 F.3d 1353](#) (Fed. Cir. 2012), do not affect the outcome of his appeal. *Dean* and *Dow* both concern violations of veterans' preference rights under the Veterans Employment Opportunities Act of 1998 (VEOA), which the appellant admittedly did not raise in this appeal despite notice and an opportunity to establish jurisdiction over a VEOA appeal. *Dean*, [115 M.S.P.R. 157](#), ¶ 1; *Dow*, [109 M.S.P.R. 342](#), ¶ 1. The *Whitmore* and *Massie* decisions were both individual right of action appeals concerning the Board's consideration of all of the pertinent evidence in the record to evaluate whether the agency met its burden to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the whistleblowing activity once the appellant has made a prima facie showing of whistleblower retaliation. *Whitmore*, 680 F.3d at 1368, 1370-72, 1377; *Massie*, [118 M.S.P.R. 308](#), ¶¶ 6-8. The appellant has not articulated a reason to revisit his claims in light of these decisions. As discussed above, the appellant failed to make an initial showing of discrimination, and the administrative judge appropriately considered all of the evidence in the record to deny corrective action.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the

court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.